



**UNITED NATIONS APPEALS TRIBUNAL
TRIBUNAL D'APPEL DES NATIONS UNIES**

Case No. 2010-036

Appellant
v.
Secretary-General of the United Nations
and
Commissioner-General of the
United Nations Relief and Works Agency
for Palestine Refugees in the Near East
(Respondents)

JUDGMENT

Before: Judge Mark P. Painter, Presiding
Judge Sophia Adinyira
Judge Inés Weinberg de Roca

Judgment No.: 2010-UNAT-068

Date: 29 October 2010

Registrar: Weicheng Lin

Counsel for Appellant: George G. Irving

Counsel for Respondents: Cristián Gimenez Corte for the Secretary-General
Thomas Markushewski for the Commissioner-General

JUDGE MARK P. PAINTER, Presiding.

Synopsis

1. The Appellant might have had a claim. But she filed it against the wrong entity. Her case is against the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). But she filed against the Secretary-General. Though the case has had an unfortunate history, and though we sympathize with Appellant's original problems, she has pursued the claim in an untenable manner. It is now unquestionably time-barred, and we are constrained to dismiss.

2. The impugned decision of the Secretary-General in this case was issued on 20 February 2008, which is the date of the Deputy Secretary-General's letter to the Appellant notifying her that the Secretary-General would take no further action in her case and that any recourse in respect of the decision should be addressed to the former Administrative Tribunal. Under Article 7(4) of the former Administrative Tribunal's Statute, an appeal was due 90 days from the date of the notification of the decision. Her appeal was therefore due by 20 May 2008. She filed her appeal only on 25 August 2009, more than 15 months after the applicable time limit.

3. The UNRWA appeal is also out of time. The Appellant appealed to the UNRWA Joint Appeals Board (UNRWA JAB) on 9 November 2008. UNRWA submits that prior to that, the Secretariat of the UNRWA JAB had not been contacted nor had there been any submission warranting the waiver of the time limits.

Facts and Procedure

4. The Appellant (We use this title at her request because of the nature of the case—in this document only. We will normally use proper names.) joined UNRWA on 21 January 2001 on a one-year fixed-term appointment as Field Legal Officer, Gaza Field Office. Her appointment was extended until 20 January 2006. On 20 January 2006, the Appellant was separated from UNRWA upon the expiry of her fixed-term appointment. (According to the Appellant, she continued working with the Alliance of Civilizations Office in New York on assignments of varying durations until 31 August 2008, when her appointment expired.)

5. From 14 September 2004 to 25 May 2005, the Appellant was on fully paid sick leave. When her entitlement of paid sick leave expired on 25 May 2005, extended sick leave was approved at the discretion of the Commissioner-General.

6. On 1 November 2004, the Appellant addressed a letter to the Secretary-General, in which she raised a series of allegations against her supervisor (we redact his name also), including allegations of harassment and threat to life, sexual harassment, discrimination, and abuse of authority. In December 2004, she travelled to New York and submitted a complaint to the Secretary-General regarding the supervisor's conduct. In February 2005, the Secretary-General requested the UNRWA Commissioner-General to initiate an investigation into the allegations. Also in February 2005, the supervisor requested an investigation to clear himself of the charges made by the Appellant.

7. On 20 February 2005, UNRWA commenced its investigation. In July 2005, the Commissioner-General informed the Appellant that the investigation had found that her charges were unsubstantiated.

8. On 21 March 2005, the Assistant Secretary-General for Human Resources Management of the United Nations received the report of the investigation conducted by UNRWA. Because there were "certain problems" with the investigation, it was decided to refer the matter to the Office of Internal Oversight Services (OIOS) of the United Nations for a fresh investigation. But OIOS had no jurisdiction over UNRWA.

9. In May 2005, the Appellant was diagnosed with post traumatic stress disorder (PTSD). On 13 July 2005, the Advisory Board on Compensation Claims (ABCC) recommended that the Appellant's PTSD illness be recognized as attributable to the performance of official functions on behalf of the United Nations; that, therefore, all medical expenses directly related to the illness and reasonable for the treatments/services should be reimbursed; and that she be granted special sick leave credit for the period from 14 September 2004 through 3 July 2005 and she be credited for any days of annual leave that she had been charged in order to remain on full pay status. On 16 July 2005, the ABCC's recommendation was approved on behalf of the Secretary-General. But it appears that this decision has never been implemented, because the ABCC had no jurisdiction in UNRWA cases.

10. Beginning 1 August 2005, the Appellant undertook work with the United Nations Alliance of Civilizations Office in New York under an inter-agency loan agreement.

11. In December 2005, the Appellant was informed orally by OIOS of its findings. The written OIOS report dated 26 February 2006, which she did not receive at the time, stated that evidence “tend[ed] to support a finding” that the Appellant had been sexually harassed by her supervisor, but that it did not support a finding that the supervisor had engaged in workplace harassment.

12. In October 2006, the Appellant wrote to the Secretary-General requesting a review of the administrative decision rejecting her claim of sexual harassment by her former supervisor “leading to [her] loss of employment”.

13. In November 2006, the Appellant was advised that administrative decisions taken by UNRWA were not subject to a review by the Secretary-General of the United Nations. Though the Secretary-General of the United Nations had ordered the OIOS to investigate, somewhere along the line it was discovered that he evidently had no authority to do so.

14. In December 2006, the Appellant lodged an appeal with the New York Joint Appeals Board (New York JAB) concerning matters arising during her employment with UNRWA. In its report issued on 11 December 2007, the New York JAB held that it lacked jurisdiction in the Appellant’s case and made no recommendation. It nevertheless suggested to the Secretary-General of the United Nations to either explore with the UNRWA Commissioner-General the possibility of changing the venue to the New York JAB to ensure fairness and impartiality, as well as the perception of the same; to authorize the Appellant to submit her case directly to the former Administrative Tribunal; or to request the Appellant to resubmit her appeal to the UNRWA JAB, provided an objective climate could be assured.

15. By letter dated 20 February 2008, the Appellant was informed that the Secretary-General of the United Nations agreed with the JAB’s conclusion that it lacked jurisdiction, and that he had therefore decided to take no further action. The letter stated that because the Secretary-General of the United Nations lacked competence over UNRWA’s internal justice system, he did not comment on the JAB’s suggestions and recommended that the Appellant seek further legal advice as soon as possible.

16. On 9 November 2008, the Appellant filed an appeal with the UNRWA JAB. On 30 June 2009, UNRWA, under Article 7(1) of the former Administrative Tribunal's Statute and pursuant to a request by the Appellant's counsel, agreed to submit the case directly to the former Administrative Tribunal.

17. The Appellant filed an application with the former Administrative Tribunal on 25 August 2009. On 1 September 2009, the Executive Secretary of the former Administrative Tribunal returned her appeal, asking that she make corrections and resubmit it by 30 October 2009. The Appellant resubmitted her appeal on 30 September 2009. The Respondent named was the Secretary-General of the United Nations, not the Commissioner-General of UNRWA.

18. The case was transferred to the United Nations Appeals Tribunal following the abolition of the former Administrative Tribunal at the end of 2009. The Appellant and UNWRA submitted the case directly to the former Administrative Tribunal under Article 7(1) of the latter's Statute without a hearing. The case could have been transferred for a hearing to the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) if UNRWA had an agreement to use the UNDT, but it does not. UNWRA can only transmit to the Appeals Tribunal, and only if it has concluded a proper first-instance hearing. But the transfer of this case was under the transition procedures, and, though technically doable, makes no sense.

19. UNRWA submitted the Respondent's answer on 13 February 2010. By letter dated 14 June 2010, the Registry informed the Appellant that her case would not be heard at the Appeals Tribunal's summer session 2010, because the Judges reviewing her case had decided that they required an answer from the Secretary-General of the United Nations — UNRWA had responded though it was not named; but the named party had not responded. The same day, it transmitted the appeal to the Secretary-General of the United Nations, who filed his answer on 29 July 2010. On 12 August 2010, the Appellant filed an additional submission.

20. On 21 October 2010, the Appeals Tribunal ordered, upon the Appellant's request, that an oral hearing be held in the Appellant's case on 25 October 2010 (Order No. 17(2010)). The same day, the Commissioner-General requested an adjournment of the oral hearing on the ground that counsel for UNRWA could not participate in the hearing even by video-link. UNRWA was in the midst of a strike by its national staff who

had locked the international staff out of UNRWA's offices; and the case files and video facilities were inaccessible. The Appellant responded that she was concerned over a further prolongation of the consideration of her case. By Order No. 18(2010), the Appeals Tribunal therefore vacated the scheduling order and cancelled the oral hearing of 25 October 2010.

Submissions

Appellant's Appeal

21. The Appellant requests that the Appeals Tribunal order the production of all relevant UNRWA and OIOS reports dealing with her allegations.

22. On the merits, the Appellant requests the Appeals Tribunal:

- to rescind the Secretary-General's decision to take no action in her case;
- to find that the New York JAB erred in law in finding that it had no jurisdiction over her case;
- to find that her rights were violated by OIOS's refusal to release the findings of the investigation report to her and by actively misleading her into believing that her allegations were not sustained when, in fact, they were;
- to order her immediate reinstatement in an equivalent established position;
- to award, under Article 10(1) of the former Administrative Tribunal's Statute, USD 1,000,000 on an exceptional basis, as compensation for the denial of her due process rights, moral damages, harm to her career and professional reputation, and material misrepresentation by OIOS;
- to order that the decision based on the ABCC's recommendation be fully implemented;
- to fix the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case; and
- to award as costs the sum of USD 10,000 in legal fees and USD 500 in expenses and disbursements.

23. The Appellant submits that the Secretary-General, by approving the JAB report, failed to take the proper steps to have her complaint handled in a timely and proper manner in accordance with the requirements of due process, and thereby failed in his duty of care. She argues that she had sought redress through the United Nations appeals procedures because, within UNRWA, she had no forum to file a complaint; and because UNRWA had demonstrated its inability to conduct a fair and impartial investigation.

24. The United Nations undertook to become involved in seeking a just resolution of her complaints and thereby became directly involved in the process and had a duty of care to ensure that the Appellant, who at the time was a United Nations official, was treated fairly. In addition to UNRWA's actions, OIOS's refusal to provide the Appellant with a copy of its investigative report, its inaction on her whistle-blower protection status, and its active misrepresentation to her over the outcome of the investigation are matters that should have been adjudicated under the United Nations Staff Rules. Since the Secretary-General has also assumed the responsibility for the Appellant's medical and employment issues, the New York JAB correctly "saw no reason why a United Nations JAB could not assume jurisdiction for the present appeal". It, however, failed to exercise jurisdiction, leaving the Appellant without remedy for those issues.

25. The Appellant requests this Tribunal to find that the Secretary-General failed to deal "fairly, comprehensively, and effectively" with her case and to award her compensation for the violation of her due process rights.

26. The Appellant further alleges that the Secretary-General failed to meet his obligation to protect her from the effects of harassment, discriminatory treatment, and retaliatory action. She informed the senior UNRWA officials of the problem, who failed to take the necessary action. After reporting the matter directly to the Secretary-General, due to an apparent conflict of interest on the part of the UNRWA Commissioner-General, the Secretary-General referred the case back to UNRWA for investigation. The conflict of interest became apparent when the Commissioner-General appointed a personal acquaintance of her supervisor whom she had accused of sexual harassment to conduct the investigation and then withheld the report from the Appellant. In light of these irregularities, the Secretary-General decided to allow OIOS to conduct an investigation. Following an intervention by the French authorities, the investigation was postponed, thereby allowing her supervisor to retire from the Organization avoiding accountability for his actions. Despite repeated requests, the Appellant was denied access to the investigation report and was not given the basis for the decision to close her case.

27. As a result of the Secretary-General's failure to act, the Appellant's career has been interrupted, her professional reputation injured, her physical and mental health adversely affected, and the Organization's own reputation as a good employer tarnished.

28. The failure to provide the investigation report to the Appellant is compounded by the active misrepresentation by the OIOS investigators to her about the conclusion reached in their report. This misrepresentation resulted in serious harm to the Appellant as the alleged perpetrator was allowed to retire as a result of this conclusion. To prevent this outcome, the Appellant's supervisor wrote to the Chef de Cabinet to inform him that the alleged perpetrator would retire in December 2005. The Appellant herself wrote to UNRWA demanding that the alleged perpetrator not be allowed to retire pending the completion of the OIOS investigation. The OIOS investigation, which had been stalled since May 2005, was restarted in response to those letters. The investigation was hurriedly concluded and the Appellant was deliberately misinformed of the conclusion with a view to allowing the alleged perpetrator to retire without having been held accountable for his actions.

Secretary-General's Answer

29. The Secretary-General submits that the appeal is not receivable *ratione temporis* and *ratione materiae*. He requests the Appeals Tribunal to dismiss the appeal in its entirety.

30. The Secretary-General submits that the appeal is not receivable *ratione temporis*. The impugned decision in this case was issued on 20 February 2008, which is the date of the Secretary-General's letter to the Appellant notifying her that he accepted the JAB's conclusion that it had no competence to review her case. The letter notified her that the Secretary-General would take no further action in her case and that any recourse in respect of that decision should be addressed to the former Administrative Tribunal pursuant to the time limits set forth in the former Administrative Tribunal's Statute. Under Article 7(4) of the said Statute, an appeal was due 90 days from the date of the notification of the decision. Her appeal was therefore due by 20 May 2008. But she filed her application more than 16 months after the applicable time limit.

31. The Secretary-General further submits that the appeal is not receivable *ratione materiae*. Under Article 2(1) of the Statute of the Appeals Tribunal, the Appeals Tribunal has jurisdiction over appeals filed against judgments rendered by the UNDT. The Appellant is not appealing a UNDT judgment. Furthermore, Article 2(10) of the Appeals Tribunal's Statute limits the Appeals Tribunal's jurisdiction in this case to the case brought against UNRWA. UNRWA agreed to submit the matter as an application directly to the former Administrative Tribunal under Article 7(1) of its Statute. The Secretary-General is not party

to the agreement, which can therefore not be extended to him. Finally, should the Appeals Tribunal find that the late submission of the Appellant's appeal to the former Administrative Tribunal was justified, the case should be transmitted to the UNDT for a determination of the facts.

UNRWA's Submission

32. As a preliminary matter, UNRWA points out that the Appellant names, as the Respondent, the Secretary-General of the United Nations. UNRWA, as an organ of the United Nations, reports directly to the General Assembly. It is accountable solely to the General Assembly in accordance with its foundation document, United Nations General Assembly resolution 302 (IV). UNRWA is therefore not competent to respond on behalf of the Secretary-General of the United Nations. UNRWA stresses that "notwithstanding [the] unfortunate framing" of the appeal, it provides submissions to the extent that the appeal relates to appealable decisions regarding the Appellant's employment with UNRWA.

33. UNRWA claims that the appeal is not receivable. The Appellant failed to request administrative review of the decisions that are the subject of the appeal, as required by UNRWA Staff Rule 111.3(a). Furthermore, the appeal is time-barred. Even if the Appellant's faulty submission to the Secretary-General were to be considered as a proper request for administrative review or if the Secretary-General's decision of 20 February 2008 were considered as a decision for the purpose of initiating an appeal before the UNRWA JAB—assumptions which UNRWA rejects—the Appellant's appeal dated 9 November 2008 would be out of time. UNRWA submits that prior to the Appellant's appeal of 9 November 2008, the Secretariat of the UNRWA JAB had not been contacted nor had there been any submission warranting the waiver of the time limits. Similarly, had the Appellant chosen to directly submit her case to the former Administrative Tribunal, her application would have been out of time. The Appellant did not demonstrate any exceptional circumstances that would have formed the basis for an extension in her case. The appeal is therefore not receivable.

34. UNRWA requests that the Appeals Tribunal reject the Appellant's requests to rescind the Secretary-General's decision to take no action in the case, and to find that the New York JAB erred in law in finding that it had no jurisdiction. Both requests were not part of the

appeal filed with the UNRWA JAB. Because this appeal is a direct submission to the Tribunal, it “should be in respect of a first instance review of the claims originally asserted by the [Appellant] before the UNRWA Joint Appeals Board relating to matters arising during her period of employment with UNRWA and not as second instance review of the earlier UN/NY JAB recommendation and resulting Secretary-General decision”. In the alternative, UNRWA submits that neither the New York JAB nor the Secretary-General erred in finding that they had no jurisdiction in relation to UNRWA employment matters.

35. UNRWA rejects the Appellant’s allegations that her due process rights were violated by the failure to conduct a thorough investigation into her allegations; as well as by OIOS’s refusal to release the finding of its investigation report, and by deliberately misleading her into believing that her allegations were not sustained when they were. UNRWA submits that the Appellant did not file any formal complaint of sexual harassment and retaliation with UNRWA; that, as soon as UNRWA was formally made aware of such allegations by the United Nations Secretariat, it took immediate action to investigate the allegations; that the Appellant, by her own admission, refused to cooperate with the investigation; and that she was promptly provided with the information regarding the outcome of the investigation. UNRWA further rejects the Appellant’s assertion that UNRWA had no established procedures for dealing with sexual harassment or a confidential focal point for reporting complaints. UNRWA adopted and implemented the United Nations standards at the time. The UNRWA investigation concluded that none of the Appellant’s claims could be substantiated and that she systematically refused to cooperate with the investigation. UNRWA fully cooperated with the subsequent OIOS investigation and the Appellant’s allegations were clearly investigated.

36. Regarding the ABCC recommendation, UNRWA submits that as a matter of law, the Appellant’s claims relating to illness attributable to the performance of official duties on behalf of UNRWA were governed exclusively by the UNRWA Staff Regulations and Rules. Upon learning of the ABCC’s involvement, UNRWA immediately objected stating that the ABCC had no jurisdiction over UNRWA staff members. UNRWA contends that there is no ABCC decision before the Appeals Tribunal for its consideration. It adds that the Appellant has so far refused to properly submit a claim to UNRWA and UNRWA remains ready to consider any claim submitted through its own regulatory framework.

37. UNRWA contends that the Appellant's request for immediate reinstatement has no basis. From 1 August 2005, Applicant worked with the United Nations Alliance of Civilizations on an inter-agency loan. UNRWA had agreed to the inter-agency loan arrangement on the condition that she would return to work with UNRWA upon its completion at the end of October 2005. Following an extensive e-mail exchange regarding the Appellant's appointment and loan, she was separated effective 20 January 2006, on expiry of her fixed-term appointment. The Appellant herself effected the separation when she did not return to UNRWA upon the completion of her loan and immediately thereafter undertook an assignment with United Nations Office for Project Services and thereafter with the United Nations Joint Staff Pension Fund.

38. UNRWA finally claims that the Appellant's request for damages and costs is baseless. She had been employed as a legal officer by UNRWA and therefore was, or should have been, specifically aware of UNRWA's rules and procedures. She however pursued and continues to pursue legally invalid procedures in connection with a medical claim improperly initiated, appeals incorrectly filed, and allegations of harassment that confused her role in the investigation process, her expectations regarding its outcome, and resulting claims alleging due process violations and misinformation. UNRWA submits that any uncertainty or delay is to be attributed to the Appellant alone.

Considerations

39. Both the Secretary-General and UNRWA allege that the case is off-track and is appealed wrongly to the wrong body from the wrong body. They are correct.

40. The Appellant might have had a claim. But she filed it against the wrong entity. Her case is against UNRWA. But she filed against the Secretary-General. Though the case has had an unfortunate history, and though we sympathize with the Appellant's original problems, she has pursued the claim in an untenable manner. It is now unquestionably time-barred, and we are constrained to dismiss.

41. The impugned decision of the Secretary-General in this case was issued on 20 February 2008, which was the date of the Deputy Secretary-General's letter to the Appellant notifying her that the Secretary-General would take no further action in her case and that any recourse in respect of the decision should be addressed to the former

Administrative Tribunal. Under Article 7(4) of the former Administrative Tribunal's Statute, an appeal was due 90 days from the date of the notification of the decision. Her appeal was therefore due by 20 May 2008. She filed her application only on 25 August 2009, more than 15 months after the applicable time limit.

42. The UNRWA appeal is also out of time. The Appellant appealed to the UNRWA JAB on 9 November 2008. UNRWA submits that prior to that, the Secretariat of the UNRWA JAB had not been contacted nor had there been any submission warranting the waiver of the time limits.

43. As to the ABCC's non-implemented decision, that body had no jurisdiction either, so its decision was a nullity.

Judgment

44. We dismiss the appeal.

Dated this 29th day of October 2010 in New York, United States.

Original and authoritative version: English

(Signed)

Judge Painter, Presiding

(Signed)

Judge Adinyira

(Signed)

Judge Weinberg de Roca

Entered in the Register on this 29th day of December 2010 in New York, United States.

(Signed)

Weicheng Lin, Registrar